89-1827

No. ____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

SILAS E. COUNTS,
Petitioner,

v.

BURLINGTON NORTHERN RAILROAD COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOHN C. HOYT *
ALEXANDER BLEWETT, III
KURT M. JACKSON
HOYT & BLEWETT
P. O. Box 2807
Great Falls, MT 59403
(406) 761-1960

Attorneys for Petitioner
Silas E. Counts

* Counsel of Record

May 18, 1990

PRINTING CENTER • (406) 761-1555 • GREAT FALLS, MT 59401

QUESTION PRESENTED

By enacting the Federal Employers' Liability Act, 45 U.S.C. § 51, *et seq.*, did Congress intend to preempt all state law causes of action for intentional torts committed by a railroad employer against an employee in connection with the investigation, negotiation, settlement and release of a FELA claim?

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IN THE
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No. ___

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v.

BURLINGTON NORTHERN RAILROAD COMPANY,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioner, Silas E. Counts, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on February 21, 1990.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 896 F.2d 424 (9th Cir. 1990), and appears in the Appendix at 1a. The District Court's Order granting Burlington Northern Railroad Company's motion for judgment

on the pleadings or for summary judgment has not been reported and appears in the Appendix at 6a.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals for the Ninth Circuit was entered on February 21, 1990. Appendix at 14a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) (1988).

STATUTES INVOLVED

The Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 is set forth in the Appendix at 15a.

STATEMENT OF THE CASE

A. PROCEEDINGS BELOW

On November 7, 1986, petitioner, Silas E. Counts, filed two separate actions in Montana Federal District Court against his employer Burlington Northern Railroad Company (BN). In Cause No. CV-89-142-BLG-JFB, Counts sought damages under the Federal Employers' Liability Act (FELA) for permanently disabling injuries sustained while working as an equipment operator at BN's Livingston, Montana facility. In Cause No. CV-86-87-H-CCL, which is the subject of this petition, Counts invoked the Court's diversity jurisdiction under 28 U.S.C. § 1332 and alleged state law causes of action for intentional torts committed by BN in connection with the investigation, negotiation, settlement and eventual release of his FELA claim.

The District Court granted BN's motion for judgment on the pleadings or for summary judgment in the diversity action, concluding that Counts' state law based intentional tort claims were preempted by the FELA. Appendix at 6a. On appeal pursuant to 28 U.S.C. § 1291 (1982), the Court of Appeals for the Ninth Circuit affirmed and held that Counts could attempt to "invalidate the preclusive effect of the release" in his FELA action. If the release was invalidated, Counts' FELA damages would be *reduced* by the amount of the release. The Court held that Counts could not, however, pursue a separate state law cause of action for the intentional torts committed by BN in procuring the release. Appendix at 4a.

Counts' FELA action was tried to a jury in a bifurcated proceeding in May, 1990. In the first trial, the jury found the release to be invalid based

upon fraud, misrepresentation and inadequate consideration. In the second trial, the same jury awarded personal injury damages from which the District Court deducted the amount paid by BN in exchange for the release. Thus, despite BN's fraud and intentional misconduct in obtaining the release, Counts was prevented from pursuing a state law cause of action for such misconduct and the BN was actually rewarded for its wrongdoing by a reduction of Counts' damages in the FELA action.

This case thus raises an important federal question concerning the scope and purpose of the FELA and how Congress intended it to interact with existing state common law causes of action for intentional torts which are not covered by the FELA. Because the decision of the Court of Appeals will have the effect of encouraging railroad employers to fraudulently procure FELA releases without fear of sanction or consequences, petitioner seeks review by this Court.

B. BN'S INTENTIONAL MISCONDUCT

Counts suffered severe and permanently disabling injuries to his back and left leg on October 18, 1984 when he fell through a broken deck grating while loading diesel wheels onto a railroad flatcar which, a month before the accident, had been sent to Laurel, Montana for repairs but was sent back to Livingston, Montana without being repaired. Counts would not have been injured if the car would have been repaired as required. BN determined that its liability for the accident was great and that Counts was not at fault. The BN claim representative who investigated the accident reported to his superiors that he would hate to see the case end up in litigation and that it was not a good case for BN to defend, if it had to. None of this information was disclosed to Counts.

BN obtained medical reports from Counts' treating physicians which established that he had suffered a definite disc herniation in his lower back. Despite BN's knowledge that Counts was permanently disabled from ever returning to railroad work, BN's claim representative told Counts that he really was not that seriously injured. Counts was 29 years old at the time of the accident, he had an eleventh grade education, a wife and two children, and he had worked for BN in a heavy manual labor capacity since he was 19 years old. Because of the injuries he suffered as a result of BN's negligence, Counts lost yearly earnings of $24,000.00 over his work life expectancy of 33 years.

After the accident, BN began making small financial advances to

Counts while he was off work. BN had obtained a financial statement from Counts in order to determine how much money he and his family could get by on each month. The advances were much less than Counts' accumulated lost earnings and they were his sole source of income. Although BN knew that Counts was in financial trouble, it threatened to stop the advances if Counts hired an attorney to help him evaluate his FELA claim. Counts was told that if he did not hire an attorney, he would continue to receive financial assistance from BN.

In an effort to frighten and intimidate Counts, BN told him to attend the FELA trial of another injured BN employee, Bruce Jones. The *Jones* case resulted in a defense verdict for BN because its negligence was weak and not established. Despite the fact that BN knew that its negligence in Counts' case was great, it told Counts that he would probably end up like Jones if he did not accept BN's settlement offer. Counts accepted BN's offer only because BN told him that the Livingston claims office was closing and that there would not be any more offers or advances if Counts did not accept the offer that day. After the release was signed, BN concluded that the settlement was a good one for BN because Counts would have had an easy chance at a large verdict in court.

REASONS FOR ALLOWING THE WRIT

A. THE FELA DOES NOT PROVIDE A REMEDY FOR BN'S INTENTIONAL MISCONDUCT

The Court of Appeals held that Counts *does* have a remedy for BN's fraud and other intentional misconduct under the FELA because he is permitted to challenge the preclusive effect of the release in an action brought pursuant to the FELA. If successful, Counts would be awarded those damages to which he was entitled in the first place, less what he received in exchange for the release. *Hogue v. Southern Railway Co.*, 390 U.S. 516, 518 (1968). What the Court failed to recognize, however, is that in the meantime, BN's fraudulent misconduct goes unpunished and it is actually rewarded by a reduction of Counts' FELA damages. BN is permitted to engage in any manner of intentional misconduct and, if caught, it is allowed to revert to the status quo and receive a credit for that which it obtained by fraud. Thus, although Counts may eventually be "fully compensated for his personal injuries" despite BN's fraud, there is no remedy under the FELA for the actual fraud and other intentional misconduct

perpetrated by BN.

The Court of Appeals apparently recognized that, under these circumstances, there may be a right or entitlement to some "additional recovery" for fraud, but not by virtue of state law. The Court did not address whether such additional recovery may be pursued under the FELA or federal common law, although it made it quite clear that the FELA itself does not provide a remedy for fraud beyond the right to invalidate a fraudulent release. Since the FELA does not occupy the field of fraudulent misconduct and since the FELA does not explicitly or impliedly preempt state law causes of action for such intentional misconduct, this Court should grant certiorari to clarify the interaction of state and federal law in this important area.

B. THE FELA DOES NOT PREEMPT STATE INTENTIONAL TORT LAW

By enacting the FELA, Congress intended to create a *negligence* cause of action in favor of railroad employees who are injured in industrial accidents while engaged in interstate commerce. The purpose of the Act was to promote the safety of railroad employees and, thereby advance and improve the flow of interstate commerce which Congress is constitutionally empowered to regulate under the commerce clause. *Mondou v. New York, N.H. & H.R. Co.*, 223 U.S. 1 (1911). In pursuance of this goal, Congress enacted several "departures from the common law" and abolished such outdated concepts as the fellow servant rule; the common law rule against wrongful death actions; the complete defense of contributory negligence and; the defense of assumption of risk. *Id.* at 49-52.

By enacting the FELA, Congress did not, however, legislate in the field of intentional torts and this Court has held that the provisions of the FELA supersede the laws of the states but *only* insofar as they "cover the same field." *Id.* at 53; 55. Congress did not enact a detailed statute designed to govern all aspects of the railroad employer/employee relationship but only a general scheme or framework of regulation for determining liability for industrial accidents. *See, Kernan v. American Dredging Co.*, 355 U.S. 426, 432 (1958). The FELA scheme is not so comprehensive or detailed as to totally displace all remedies in favor of railroad employees which preexisted the Act. Indeed, "no purpose or intent on the part of Congress can be found to limit or to take away from such an employee any right theretofore existing by which such employees were entitled to a

more extended remedy than that conferred upon them by the Act." 45 Cong. Rec. 4044 (1910). Appendix at 20a.

Federal preemption is not to be lightly presumed and in determining whether a state law is preempted by federal law, the intent of Congress must be ascertained. *California Federal Savings & Loan Assoc. v. Guerra*, 479 U.S. 272 (1987). None of the three ways in which a federal law may supersede a state law are applicable in this case. The FELA is devoid of any express intent to preempt state law claims for intentional torts. The Act gives an employee a cause of action for death or injury resulting from the railroad's negligence but the Act does not expressly occupy or preempt the field of intentional torts.

Preemption also cannot be implied or inferred. The FELA does not even approach the field of intentional tort law and it, therefore, cannot be inferred that Congress intended to "leave no room" for existing state intentional tort laws which do occupy the field. Indeed, the Senate Judiciary Committee's Report on the 1910 amendments (Appendix at 20a) demonstrates a congressional intent to leave, undisturbed and intact, those common law rights of action which preexisted the Act. Because the FELA only governs actions for on-the-job industrial accidents caused by the railroad's negligence, the body of state intentional tort law which preexisted the FELA is a necessary corollary to the Act. Otherwise, a huge void, not intended by Congress, would be left in the law and defrauded employees such as Counts would be left totally without a remedy.[1]

Congress' silence in not expressly or impliedly precluding a cause of action for intentional torts is significant in light of its failure to specifically include such a remedy for persons injured by intentional misconduct. "It is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured" by a railroad's intentional wrongdoing. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984). It is unpersuasive to suggest that, by enacting the FELA, Congress intended to abrogate, sub silentio, the well-established concepts of intentional tort law which preexisted the Act. *See, Monessen Southwestern R. Co. v. Morgan*, 486 U.S. 330 (1988).

Finally, there is no preemption by conflict or impossibility because

[1] Although intentional misconduct may form the basis of an FELA action for personal injuries suffered on-the-job, *see, Taylor v. Burlington Northern Railroad Company*, 787 F.2d 1309 (9th Cir. 1986), there is no remedy for a defrauded employee such as Counts except for what is provided by state intentional tort law.

compliance with state law will not be a physical impossibility and compliance with state law will promote the same purposes and objectives as those contemplated by Congress in enacting the FELA. This is not a case where Counts is attempting to engraft onto an FELA negligence claim some aspect not contemplated or enacted by Congress. *See, e.g., Wildman v. Burlington Northern Railroad Co.*, 825 F.2d 1392 (9th Cir. 1987) (punitive damages); *Monessen Southwestern R. Co. v. Morgan*, 486 U.S. 330 (1988) (prejudgment interest). This case involves the entire field of intentional torts which Congress intended to leave intact on behalf of defrauded railroad workers.

C. THE PRACTICAL RESULTS

If the decision of the Court of Appeals is allowed to stand, railroad employers will be allowed and perhaps encouraged to commit any number of intentional torts with impunity and without fear of sanction. If, for example, in connection with the investigation, negotiation and settlement of an FELA claim, a BN claim representative intentionally slandered an injured employee by publicly calling him a "Peeping Tom" and maliciously had him falsely arrested by the police in order to damage his reputation and his chances for a successful jury verdict, the damaged employee would not be allowed to maintain a separate state law cause of action for intentional torts against the BN. The BN would be permitted to engage in conduct which would be harshly sanctioned if committed by any other entity or any other employer.

Certainly, Congress never intended such an absurd and illogical result when it enacted the FELA. The FELA was intended to protect the flow of interstate commerce by providing a more liberal *negligence* cause of action in favor of railroad workers injured in on-the-job industrial accidents. It was not intended to limit or to take away any common law right which preexisted the Act, including a cause of action for intentional misconduct. To hold otherwise would be to read into the Act more than was intended and deprive defrauded employees such as Counts the legal protections afforded any other citizen.

CONCLUSION

For the foregoing reasons, the Court should grant this petition for certiorari.

Respectfully submitted,

JOHN C. HOYT *
ALEXANDER BLEWETT, III
KURT M. JACKSON
HOYT & BLEWETT
P. O. Box 2807
Great Falls, MT 59403
(406) 761-1960

Attorneys for Petitioner
Silas E. Counts

* Counsel of Record

May 18, 1990

APPENDIX

APPENDIX

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SILAS E. COUNTS,

Plaintiff-Appellant,

v.

BURLINGTON NORTHERN RAILROAD COMPANY,

Defendant-Appellee.

No. 88-4297

D.C. No.
CV-86-87-H-CCL

OPINION

Appeal from the United States District Court
for the District of Montana
Charles C. Lovell, District Judge, Presiding

Argued December 5, 1989—Seattle, Washington
Submitted December 15, 1989

Filed February 21, 1990

Before: William C. Canby, Jr., Charles Wiggins and
Ferdinand F. Fernandez, Circuit Judges.

Opinion by Judge Wiggins

SUMMARY

Workers' Compensation

Affirming the district court's grant of summary judgment, the court held that a challenge to the validity of a Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 release for fraud raises a federal question to be determined under federal rather than state law.

While loading flat cars for appellee Burlington Northern Railroad Company, appellant Silas Counts injured his back and his left leg. Burlington concluded that its negligence was great and that Counts was not at fault. Counts brought a diversity action against Burlington seeking damages for its alleged fraud in inducing him to release his FELA claim. The district court held that Counts' claim, which was based on state law, was preempted by federal law because a cause of action under FELA existed for fraud in the inducement of a release. [1] Notwithstanding a document signed by an employee purporting to release his employer for FELA injury claims, the employee may bring a FELA suit for damages by challenging the validity of the release for fraud. [2] A successful challenge to Counts' release in his FELA action would invalidate the preclusive effect of the release, thus allowing Counts to carry forward his FELA claim. If he can prove his entitlement to damages under FELA, the court will award those damages less what he has already received pursuant to the release.

COUNSEL

John C. Hoyt and Alexander Blewett, Great Falls, Montana, for the plaintiff-appellant.

Dolphy O. Pohlman and Marshall L. Mickelson, Butte, Montana, for the defendant-appellee.

OPINION

WIGGINS, Circuit Judge:

Silas Counts appeals the district court's order granting summary judgment for his employer, Burlington Northern Railroad Company (Burlington). Counts argues that the district court erroneously held that his state law claim was preempted by the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51-60 (1982). We have jurisdiction under 28 U.S.C. § 1291 (1982), and we affirm.

FACTS AND PROCEEDINGS

While loading flat cars for Burlington, Silas Counts injured his back and left leg. Burlington concluded that its negligence was great and that Counts was not at fault. Burlington began making small advances to Counts, but threatened to stop those advances if he hired an attorney to examine his FELA claim. Burlington's claims representative, Ward Maser, told Counts to attend a FELA trial involving another Burlington employee, Bruce Jones, which resulted in a verdict for Burlington because its negligence was not established. Maser told Counts that, like Jones, Counts would probably end up with nothing if he did not take Burlington's settlement offer. Maser also told Counts that he really wasn't that seriously injured, despite Burlington's investigative report that found Counts' injuries permanent and disabling. Finally, Maser told Counts that the claims office in his area was closing and that there would be no more offers and no more advances if Counts did not accept Burlington's offer that day. Counts did accept the offer that day.

Counts brought a diversity action against Burlington seeking damages for its alleged fraud in inducing him to release his FELA claim. The district court held that Counts' claim, which was based in state law, was preempted by federal law because a cause of action under FELA existed for fraud in the inducement of a release.

STANDARD OF REVIEW

This court reviews a district court's order granting summary judgment

de novo. *Orozco v. United Air Lines, Inc.*, 887 F.2d 949, 951 (9th Cir. 1989).

DISCUSSION

On appeal, Counts contends that the court's conclusion that FELA preempts his state law claim of fraud is erroneous because he has no remedy for fraud in the inducement of a release under FELA. This argument lacks merit.

[1] Notwithstanding a document signed by an employee which purports to release his employer for FELA injury claims, the employee may bring a FELA suit for damages by challenging the validity of the release for fraud.[1] *See Dice v. Akron, Canton & Youngstown R.R. Co.*, 342 U.S. 359 (1952). A challenge to the validity of a FELA release for fraud raises a federal question to be determined under federal rather than state law. *Id.* at 361. To permit independent state-law actions for fraud in inducing FELA releases would lead to results that would vary from state to state. That we cannot allow. "[O]nly if federal law controls can the federal Act be given that uniform application throughout the country essential to effectuate its purposes." *Id.*

[2] A successful challenge to Counts' release in his FELA action would invalidate the preclusive effect of the release, thus allowing Counts to carry forward his FELA claim. If he can prove his entitlement to damages under FELA, the court will award those damages less what he has already received pursuant to the release. *Hogue v. Southern Ry. Co.*, 390 U.S. 516, 518 (1968). Thus, despite Burlington's fraud, Counts will be fully compensated for his personal injuries. Whether Counts may be entitled under FELA or federal common law to any additional recovery is a question not now before us, and we do not address it. It is clear, however, that his state law claim is preempted, regardless of whether federal law provides the remedy he seeks. *See Wildman v. Burlington Northern R.R. Co.*, 825 F. 2d 1392, 1395 (9th Cir. 1987) (absence of punitive damages remedy under FELA does not leave states free to fashion such a remedy); *cf. Monessen v. Southwestern Ry. Co. v. Morgan*, 108 S. Ct. 1837, 1842-

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[1]Indeed, Counts has a FELA claim pending in the Montana district court.

44 (1988)(state law cannot apply to permit prejudgment interest award in FELA case where FELA does not authorize awards of prejudgment interest).

Counts has a cause of action under FELA available to him. Thus, Counts may not bring an independent state law claim for fraud in the inducement of a release. *See Lancaster v. Norfolk & Western Ry. Co.*, 773 F.2d 807, 812 (7th Cir. 1985), *cert. denied*, 480 U.S. 945 (1987) (railroad employee cannot sue under state law where FELA cause of action exists).

The decision of the district court is **AFFIRMED**.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

****

SILAS E. COUNTS,

Plaintiff, CV 86-87-H-CCL

-v-

BURLINGTON NORTHERN
RAILROAD COMPANY, *ORDER*

Defendant.

****

This action arises out of a release executed by the plaintiff in connection with injuries he sustained in October, 1984, during his employment with the defendant (BN). The cause is before the court on the BN's motion for judgment on the pleadings or for summary judgment.

The facts of this case, and the claims pleaded in the complaint, are substantially similar to those involved in *Klingler v. Burlington Northern Railroad Co.*, CV 86-98-H-CCL. Plaintiff sustained injury on October 18, 1984, while working at the BN's Livingston facilities. Thereafter, BN obtained a release of all claims from plaintiff, which purportedly resolved plaintiff's FELA claims as well as foreclosing him from future employment with the BN, and was allegedly procured by fraud.

The arguments raised by the parties in this case are substantially identical to the arguments raised in *Klingler.* The court incorporates its analysis in *Klingler,* and finds it dispositive of the issues in this case. Accordingly,

IT IS HEREBY ORDERED that Burlington Northern's motion for judgment on the pleadings or for summary judgment is GRANTED. Judgment shall enter in accordance herewith.

The clerk is directed forthwith to notify counsel of entry of this order.

Done and dated this 18th day of October, 1988.

By /s/ CHARLES C. LOVELL
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

****

BETTY I. KLINGLER,

Plaintiff,

CV 86-98-H-CCL

-v-

BURLINGTON NORTHERN RAILROAD COMPANY,

Defendant.

MEMORANDUM AND ORDER

****

Plaintiff seeks damages arising out of a release executed after she sustained injuries during the course of her employment with the defendant Burlington Northern Railroad Co. (BN). The complaint alleges fraud in the procurement of the release and bad faith under Montana's Unfair Claims Settlement Practices Act, and seeks compensation and punitive damages. The cause is before the court on the BN's motion to dismiss or for summary judgment.

By order dated March 17, 1988, the court took under advisement plaintiff's request for additional oral argument and now, being of the opinion that the matter adequately has been submitted, hereby DENIES the motion for further argument. Plaintiff initially requested the court to treat BN's motion as one for dismissal; however, on plaintiff's motion depositions have been filed and, accordingly, the motion is treated as one for summary judgment.

FACTS[2]

Betty Klingler was first employed by the BN in 1974 at the age of 46. After approximately ten years as an office clerk, Klingler was transferred to the material department, where her duties changed to manual labor, namely janitorial work. Plaintiff sustained an on-the-job injury in April, 1984, while working with a power vacuum.

[2]The facts are drawn from the pleadings, depositions, and other materials on file. Where disputed, all inferences are drawn in the plaintiff's favor. *See T.W. Electrical Service, Inc. v. Pacific Electrical Contractors Assn.*, 809 F.2d 626, 630-31 (9th Cir. 1987).

On June 13, 1986, while plaintiff was on medical leave of absence, she attended a meeting with a number of other "junior clerks" and representatives of the BN. At that time, the clerks were offered a "buy-out" or separation agreement with the railroad, consisting of severance pay in the gross amount of approximately $36,000. Because Klingler's claim for injuries was still outstanding, she was not permitted to sign a separation agreement, although she completed all of the preliminary documents, including verification of her acceptance.

On August 4, 1986, Klingler was released to return to work by her treating physician.

On August 21, 1986, Klingler met with BN claims agent Kenneth Stiles in Livingston, Montana. At that time, since there was no position available for her, Klingler requested that she be given a 60 percent bulletined position, by which she would be "on call" for the BN and receive 60 percent of her wages whether she worked or not. Mr. Stiles explained that Klingler could not do that because she had agreed to separation in June. He then presented her with a release of all claims under which, in consideration for a net sum of $36,000, Klingler agreed to give up any right to future employment with the BN and any claim she had against the BN arising out of the 1984 injury or "any other accidents." The release further provided that Klingler's injuries "forever and permanently disable[d]" her from returning to work for the BN, and that she surrendered all seniority rights and rights to any benefits under a merger or protective agreement.

Klingler signed the release believing that it was her only opportunity to obtain a severance allowance from the railroad, and that if she did not sign she would, in effect, walk away with nothing.

On November 26, 1986, Klingler filed two complaints against the BN in this court. In the first CV 86-97-H, she invokes the FELA and seeks relief for the injuries she sustained in the 1984 incident and damages resulting therefrom.[3] In CV 86-98-H, she invokes the court's jurisdiction by virtue of diversity of citizenship between the parties and seeks damages based upon common law tort theories of recovery and upon the laws of the state of Montana.

The BN moves for judgment in its favor on the ground that Klingler's

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[3]The BN has raised the release signed by Betty Klingler on August 21, 1986, as an affirmative defense to the complaint in 86-97-H.

state law claims for relief are preempted by the Federal Employer's Liability Act (FELA), 45 U.S.C. §§ 51-60.

DISCUSSION

Before reaching plaintiff's fraud claim, the court notes that she has abandoned her claim under Montana's Unfair Claims Settlement Practices Act in view of *Martel v. Montana Power Co.*, ___Mont.___, 752 P.2d 140, 147-48 (1988). Accordingly, Count Two of the complaint is withdrawn and need not be considered.

Count One of the complaint alleges fraud in the inducement of the release. BN asserts that the validity of the release is governed by federal law, may be determined as part of the FELA action, and is preempted.

The court's analysis begins with an examination of the principles of federal preemption. "It is a familiar and well-established principle that the Supremacy Clause, US Const, Art VI, cl 2, invalidates state laws that 'interfere with, or are contrary to' federal law." *Hillsborough County v. Automated Med. Labs.*, 471 U.S. 707, 712 (1985).

> Federal law may supersede state law in several different ways. First, when acting within constitutional limits, Congress is empowered to preempt state law by so stating in express terms ... Second, congressional intent to preempt state law in a particular area may be inferred where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress "left no room" for supplementary state regulation ... As a third alternative, in those areas where Congress has not completely displaced state regulation, federal law may nonetheless preempt state law to the extent it actually conflicts with federal law. Such a conflict occurs either because "compliance with both federal and state regulations is a physical impossibility," ... or because the state law stands "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

California Federal Savings & Loan Assn. v. Guerra, 479 U.S. 272,____ (1987) (citations omitted).

The FELA has been held to provide "the sole and exclusive remedy for injured employees of railroad carriers engaged in interstate commerce." *Wildman v. Burlington Northern R. Co.*, 825 F.2d 1392, 1395 (9th Cir.

1987). The preemptive effect of the FELA over state law covering the "same field" has long been established. *Second Employers' Liability Cases*, 223 U.S. 1, (1912). "[T]he FELA preempts state law within its domain, ... so that a railroad worker who has a cause of action under the FELA cannot sue under the state tort law instead." *Lancaster v. Norfolk and Western Ry. Co.*, 773 F.2d 807, 812 (7th Cir. 1985).

The validity of a release may be challenged in a FELA action, and is governed by federal law. *Dice v. Akron, C. & Y. R. Co.*, 342 U.S. 359, 361 (1951). "Releases and other devices designed to liquidate or defeat injured employees' claims play an important part in the federal Act's administration ... Their validity is but one of the many interrelated questions that must constantly be determined in these cases according to a uniform federal law." *Id.* at 361-62. A release challenged for fraud will be held void "when the employee is induced to sign it by the deliberately false and material statements of the railroad's authorized representatives made to deceive the employee as to the contents of the release." *Id.* at 362. Additionally, a FELA release may be challenged for lack of consideration. *Maynard v. Durham & Southern R. Co.*, 365 U.S. 160, 161 (1961). The test for adequacy of consideration for a release of claims under the FELA was stated in *Maynard*:

> "In order that there may be consideration, there must be mutual concessions. A release is not supported by sufficient consideration unless something of value is received to which the creditor had no previous right." If, in other words, an employee receives wages to which he had an absolute right, the fact that the amount is called consideration for a release does not make the release valid.

Id. at 163 (citations omitted).

When a release is successfully challenged in a FELA action, the sum paid under the release is deducted from any award determined to be due the injured employee. *Hogue v. Southern Ry. Co.*, 390 U.S. 516, 518 (1968).

Under section 55 of the FELA, 45 U.S.C. § 55, a railroad is prohibited from attempting to exempt itself from FELA liability by virtue of "[a]ny contract, rule, regulation, or device whatsoever." This section was enacted as a "shield" against a railroad's defense that an employee had

waived his or her rights under the FELA, but does not provide a "sword" for an employee to file a separate suit against the railroad. *Bay v. Western Pac. R. Co.*, 595 F.2d 514, 516 (9th Cir. 1979).

With these principles in mind, the court concludes that, to the extent the release involves plaintiff's FELA claims, it must be challenged as part of the FELA action, in accordance with federal law. This conclusion is supported by other decisions of this court, *Toscano v. Burlington Northern R. Co.*, 678 F. Supp. 1477 (D. Mont. 1987), *Dannels v. Burlington Northern R. Co.*, CV 86-048-GF (D. Mont. June 11, 1986), and promotes the uniformity intended by the FELA. The FELA being the exclusive remedy for railroad workers injured on the job, plaintiff may not bring an action directly related to her FELA claim but having its genesis in state law.[4]

This conclusion, however, does not dispose of the matter. The complaint includes claims for damages separate and apart from plaintiff's FELA claims, including the alleged loss of opportunity to return to the BN's employment without adequate compensation therefor. These damages will not be part of the FELA case. The question then arises whether plaintiff's remaining claims are within the ambit of the Railway Labor Act (RLA), 45 U.S.C. §§ 151, *et seq.*

The RLA was enacted "in order to promote stability in the railroad industry and to provide for prompt and efficient resolution of labor-management disputes arising out of railroad collective bargaining agreements." *Lewy v. Southern Pacific Transportation Co.*, 799 F.2d 1281, 1289 (9th Cir. 1986). Under the RLA, all "disputes between [railroad] employees and ... carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions" must be presented to the National Railroad Adjustment Board for compulsory arbitration. 45 U.S.C. § 153 First (i).

The Ninth Circuit consistently has held that "the RLA preempts state tort claims by employees against railroads for wrongful discharge or for intentional infliction of emotional distress, where the alleged tortious activity is ' "arguably" governed by the collective bargaining agreement or has a "not obviously insubstantial" relationship to the labor contract,'

---

[4] *Buell v. Atchison, Topeka & Santa Fe Railway Co.*, 771 F.2d 1320 (9th Cir. 1985), *rev'd on other grounds*, 107 S. Ct. 1410 (1987) suggests that plaintiff might be able to pursue her emotional distress claims in the FELA action.

and where 'the gravamen of the complaint is wrongful discharge.'" *Lewy*, 799 F.2d at 1290 (quoting *Magnuson v. Burlington Northern, Inc.*, 576 F.2d 1367, 1369-70 (9th Cir.), *cert. denied*, 439 U.S. 930 (1978)). *See also Beers v. Southern Pacific Transp. Co.*, 703 F.2d 475 (9th Cir. 1983). Thus, if the "basic injury" of which plaintiff complains is her wrongful discharge, "the complaint involves a minor dispute which must be arbitrated following the procedures of the RLA." *Magnuson*, 576 F.2d at 1369.

In *Lewy*, the court held that the RLA precluded a FELA plaintiff from recovering damages for aggravation of his injuries resulting from his subsequent wrongful discharge. The court recognized that the RLA does not preempt a state tort claim if it is "'either unrelated to employment discrimination or a function of the particularly abusive manner in which the discrimination is accomplished or threatened rather than a function of the actual or threatened discrimination itself.'" *Id.*, 799 F.2d at 1290 n.8 (quoting *Farmer v. United Brotherhood of Carpenters & Joiners, etc.*, 430 U.S. 290, 305 (1977)). The court found, however, that the plaintiff's discharge-related claims were based on the FELA and did not satisfy either of the *Farmer* requirements. *Id.*

In *Magnuson*, the court held that the plaintiff could not bring an action based on state tort law for his alleged wrongful discharge following an accident investigation, for the reason that his claims were preempted by the RLA. The court found that the damages claimed by plaintiff flowed from his wrongful dismissal, and that his emotional distress was an incident thereof. *Id.*, 576 F.2d at 1369. The court further held that it would not permit plaintiff to bypass RLA grievance procedures, and that he was required to exhaust his remedies within the statutory structure. *Id.* at 1370.

Consistent with the rulings in *Lewy* and *Magnuson*, the court finds that plaintiff's remaining claims are based on a "matrix of facts which are inextricably intertwined with the grievance machinery of the collective bargaining agreement and of the RLA." *Magnuson*, 576 F.2d at 1369.

Although Plaintiff's arguments are appealing as a matter of policy, they are matters which must be addressed by Congress and not by this court.

Accordingly, the court holds that to the extent plaintiff's claims relate to her FELA action and to the injuries sustained by her in April, 1984, they are preempted by the FELA, and that the validity of the release may be tested in the FELA action. The court further holds that plaintiff's remaining claims are within the ambit of the RLA and therefore preempted.

IT IS THEREFORE ORDERED that the Burlington Northern's motion for summary judgment is GRANTED. Judgment shall enter accordingly.

The clerk is directed forthwith to notify counsel of entry of this order.

Done and dated this *18th* day of October, 1988.

By */s/* CHARLES C. LOVELL
United States District Judge

JUDGMENT

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SILAS E. COUNTS, Plaintiff-Appellant, v. BURLINGTON NORTHERN RAILROAD COMPANY, Defendant-Appellee.	No. 88-4297 D.C. No. CV-86-87-H-CCL

APPEAL from the United States District Court for the Montana District of Helena.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Montana District of Helena and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is AFFIRMED.

Filed and entered February 21, 1990.

STATUTES

Section 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees, provides:

> Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.
>
> Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this Act be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this Act and of an Act entitled "An Act relating to the liability of common carriers by railroad to their employees in certain cases" (approved April 22, 1908) [45 USCS §§ 51 et seq.] as the same has been or may hereafter be amended.

Section 52. Carriers in Territories or other possessions of United States, provides:

> Every common carrier by railroad in the Territories, the District of Columbia, the Panama Canal Zone, or other possessions of the United States shall be liable in damages to any person suffering injury while he is employed by such carrier in any of said jurisdictions, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Section 53. Contributory negligence; diminution of damages, provides:

> In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this act [45 USCS §§ 51 et seq.] to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: Provided, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

Section 54. Assumption of risks of employment, provides:

> In any action brought against any common carrier under or by virtue of any of the provisions of this Act [45 USCS §§ 51 et seq.] to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such

injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

Section 55. Contract, rule, regulation, or device exempting from liability; set off, provides:

> Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act [45 USCS §§ 51 et seq.], shall to that extent be void: Provided, That in any action brought against any such common carrier under or by virtue of any of the provisions of this act [45 USCS §§ 51 et seq.], such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.

Section 56. Actions; limitations; concurrent jurisdiction of courts, provides:

> No action shall be maintained under this act [45 USCS §§ 51 et seq.] unless commenced within three years from the day the cause of action accrued.
>
> Under this act [45 USCS §§ 51 et seq.] an action may be brought in a circuit [district] court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this act [45 USCS §§ 51 et seq.] shall be concurrent with that of the courts of the several States.

Section 57. Who included in term "common carrier," provides:

> The term "common carrier" as used in this act [45 USCS §§ 51 et seq.] shall include the receiver or receivers or other persons or corporations charged with the duty of the management and operation of the business of a common carrier.

Section 58. Duty or liability of common carriers and rights of employees under other Acts not impaired, provides:

> Nothing in this act [45 USCS §§ 51 et seq.] shall be held to limit the duty or liability of common carriers or to impair the rights of their employees under any other Act or Acts of Congress.

Section 59. Survival of right of action of person injured, provides:

> Any right of action given by this act [45 USCS §§ 51 et seq.] to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, but in such cases there shall be only one recovery for the same injury.

Section 60. Penalty for suppression of voluntary information incident to accidents; separability of provisions, provides:

> Any contract, rule, regulation, or device whatsoever, the purpose, intent, or effect of which shall be to prevent employees of any common carrier from furnishing voluntarily information to a person in interest as to the facts incident to the injury or death of any employee, shall be void, and whoever, by threat, intimidation, order, rule, contract, regulation, or device whatsoever, shall attempt to prevent any person from furnishing voluntarily such information to a person in interest, or whoever discharges or otherwise disciplines or attempts to discipline any employee for furnishing voluntarily such infor-

mation to a person in interest, shall, upon conviction thereof, be punished by a fine of not more than $1,000 or imprisoned for not more than one year, or by both such fine and imprisonment, for each offense: Provided, That nothing herein contained shall be construed to void any contract, rule, or regulation with respect to any information contained in the files of the carrier, or other privileged or confidential reports.

If any provision of this Act [45 USCS §§ 51 et seq.] is declared unconstitutional or the applicability thereof to any person or circumstances is held invalid, the validity of the remainder of the Act [45 USCS §§ 51 et seq.] and the applicability of such provision to other persons and circumstances shall not be affected thereby.

CONGRESSIONAL RECORD

The Senate Judiciary Committee's Report on the 1910 amendments to the Federal Employers' Liability Act states, in part:

> "In considering the advisability of amending the act entitled 'An act relating to the liability of common carriers by railroads to their employees in certain cases,' approved April 22, 1908, it is important at the outset to understand that the purpose of Congress in the passage of this act was to extend further protection to employees. This was its manifest purpose, as is apparent from a consideration of the circumstances of its enactment. It is manifest from a consideration of the reports, both of the Senate and House committees, when the measure was pending before those bodies prior to its enactment, that the purpose of the statute was to extend and enlarge the remedy provided by law to employees engaged in interstate commerce in cases of death or injury to such employees while engaged in such service. No purpose or intent on the part of Congress can be found to limit or to take away from such an employee any right theretofore existing by which such employees were entitled to a more extended remedy than that conferred upon them by the act."

45 Cong. Rec. 4044 (1910).

(2)

No. 89-1827

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

SILAS E. COUNTS,
Petitioner,

v.

BURLINGTON NORTHERN RAILROAD COMPANY,
Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DOLPHY O. POHLMAN*
MARSHAL L. MICKELSON
CORETTE POHLMAN ALLEN
BLACK & CARLSON
P.O. Box 509
Butte, MT 59703
(406) 723-3205

Attorneys for Respondent
Burlington Northern
Railroad Company

*Counsel of Record

June 15, 1990

QUESTION PRESENTED

Respondent, Burlington Northern Railroad Company, is dissatisfied with the question presented by Petitioner, Silas E. Counts, as that question is not the one addressed by the Montana District Court nor the Ninth Circuit Court of Appeals. The question considered by the Montana District Court and the Ninth Circuit Court of Appeals was as follows:

> Does the Federal Employers Liability Act (FELA), 45 U.S.C. §51, et seq., preempt a state law cause of action for fraudulent inducement of a release of a injured railroad worker's claim under the FELA?

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STATEMENT OF THE CASE

Respondent is dissatisfied with Petitioner's statement of the case, as follows:

Petitioner did not bring a state law cause of action in Cause No. CV-86-87-H-CCL for "intentional torts". Petitioner brought a cause of action under Count One for fraud, and under Count Two for violation of Montana's Unfair Claims Settlement Practices Act. Petitioner

abandoned Count Two and proceeded with Count One. Count One was a state law cause of action for fraud based upon the alleged fraudulent inducement of the release of Petitioner's FELA claim. Petitioner's representation of "intentional torts" other than a state law cause of action for fraud in the inducement of an FELA release is incorrect.

Additionally, Petitioner states that a jury in May 1990 found the release to be invalid based upon fraud, misrepresentation and inadequate consideration. This is also incorrect. The jury was instructed on fraud, misrepresentation, inadequate consideration and mutual mistake. The jury then returned a general verdict, on the form requested by plaintiff, finding the release to be invalid. Thus, the jury could have found the release to be invalid for reasons other than fraud. No valid conclusions can therefore be reached from the jury's verdict that the railroad engaged in any improper conduct.

Finally, in discussing the petitioner's May 1990 FELA case, he states "...the District Court deducted the amount paid by BN in exchange for the release". No such deduction has yet been made. However, Petitioner has raised no objection to the set-off procedure to be followed by the District Court, but only as to the amount.

PETITIONER'S WRIT FOR CERTIORARI SHOULD BE DENIED AS PETITIONER HAS FAILED TO DEMONSTRATE ANY COMPELLING REASON WHY THIS COURT SHOULD ADDRESS THE QUESTION PRESENTED

The most compelling reason for denying Petitioner's writ is that this Court has already decided the question as presented. In Dice v. Acorn, Canton and Youngstown Railroad Company, 342 U.S. 359 (1952), this Court held that the "validity of releases under the Federal Employers Liability Act raises a federal question to be determined by federal law rather than state law". Id. at 361. After determining that federal law controls, this Court also determined the remedy federal law provides for fraudulently inducing a release of an FELA claim holding:

> A release of rights under the act is void when the employee is induced to sign it by the deliberately false and material statements of the railroad's authorized representatives made to deceive the employee as to the contents of the release.

Id. at 362.

Thus, certiorari of this case would not serve to foster any of the purposes of Sup.Ct.R.10. The court of appeals simply followed the existing state of the law as previously declared by this Court. Since this issue has previously been decided by this Court and there is consequently no conflict within the

circuits or within the state courts of last resort, there is no basis for granting certiorari.

Further, one of the purposes of the FELA was to provide a uniform set of laws to be applied to railroads operating from state to state in interstate commerce. New York Central Railroad v. Winfield, 244 U.S. 147, 150 (1917). Laws that conflict will be preempted. Id. This Court broadly stated:

> We do not doubt that the Federal Employers Liability Act, supplementing a patchwork of state legislation with a nationwide uniform system of liberal remedial rules, displaces any state law trenching on the province of the Act. State legislatures, for example, may not intrude into the federal Act's interstate commerce perimeter to destroy uniformity by arbitrarily presuming the renunciation of rights which the Act confers,...

South Buffalo Railroad Company v. Ahern, 344 U.S. 367, 371-72 (1953).

This Court in South Buffalo, again reaffirmed its holding in Dice, Id. at 372.

In the instant case, Congress and this Court have declared that in connection with the release of an FELA claim, the railroads will not be subject to fifty different state laws on fraud with differing elements, standards of proof and remedies. One set of laws will apply

and that law has already been set forth by this Court. The courts, both federal and state, have given uniformity to the law on releases of an FELA claim by following Dice. Again, no conflicts have arisen on this issue.

Additionally, just as this Court has directed in Dice, supra, the Petitioner is pursuing his remedy in the FELA case. Petitioner went to court and a jury voided the release and allowed his FELA damages. Since the jury returned a general verdict, it is unknown why the jury set the release aside.

Petitioner here states that the Court of Appeals recognized that there may be a right or entitlement to some "additional recovery" for fraud, but not by virtue of state law. Yet, the Petitioner in the FELA trial did not attempt to recover any damages other than the standard recoverable FELA damages. The Court of Appeals made it clear that whether Petitioner is entitled "under the FELA or federal common law to any additional recovery is a question not now before us, and we do not address it". Counts v. BN, 896 F.2d 424, 426 (9th Cir. 1990).

In enacting the FELA, Congress made a trade-off between the rights of interstate railroads and employees. Each side gave up something in return for other objectives. Congress gave the railroad workers strict liability in some circumstances and a lesser standard of negligence. Rogers v. Missouri Pacific R.R. Co., 352 U.S. 500 (1957). It took away from the railroad many common law

defenses then available but, in return, the railroads received a comprehensive set of laws for liability to their employees that applied nationwide. New York Central Railroad v. Winfield, 224 U.S. 147 (1917). Railroads will not be subject to different rules in each state. Federal preemption of state laws is always a trade-off and balancing of different interests. The instant case is another example of the balancing of different rights by Congress when enacting a nationwide plan that regulates interstate commerce. Thus, while plaintiff may not get the remedy that he wishes to have, a remedy is provided to him through the FELA.

Finally, Petitioner argues that the practical application of the court of appeals decision will result ir railroads all over the country committing intentional torts upon their employees without fear of any adverse consequences. Petitioner uses a speculative example of a "Peeping Tom" that leads to an employee's arrest. There is absolutely no resemblance between the example given and what occurred in this case. There is no evidence that this has ever occurred. Not only does the Petitioner's claim lack evidentiary support, Petitioner offers no other information to support his allegations of past or current transgressions by railroad employers. This Court should not consider granting certiorari in a case that is not in conflict with any other courts or which has no evidence or information that the problem alleged by Petitioner has or is occurring elsewhere. In fact, the

opposite appears to be true because the law setting forth the remedies for a fraudulently induced release was established in 1952 by this Court. After 1952 few cases addressing this issue have been reported. Of those that have, they are in agreement with this Court's statement of the law in Dice. See, Loose v. Consolidated Rail Corp., 534 F.Supp. 260 (E.D. Penn 1982), aff'd mem., 692 F.2d 749 (3rd Cir. 1982); and, Fournier v. Canadian Pacific Railroad, 512 F.2d 317 (2nd Cir. 1975). Congress also has not seen fit to change the FELA after Dice. All of which indicates there is no "special or important" reason for granting certiorari. Sup.Ct.R.10.

In summary, the Petition for a Writ of Certiorari should be denied. This Court already answered the question presented in 1952. Since this Court has answered the question, there is no conflict among the circuits or highest courts of the states. Since this issue was plainly decided in 1952, it has not been questioned in other cases. Neither has Petitioner provided any support for his broad and baseless allegations of abuse of the system by railroad employers. The decision by the Ninth Circuit was in conformity with this Court's decision in Dice, supra, and Petitioner is pursing his remedy as provided by federal law. Certiorari would serve no purpose in readdressing an issue already decided.

CONCLUSION

For all of the foregoing reasons, this Court should deny the Petition for a Writ of Certiorari.

Respectfully submitted,

By_____
DOLPHY O. POHLMAN*
MARSHAL L. MICKELSON
CORETTE POHLMAN ALLEN
BLACK & CARLSON
P.O. Box 509
Butte, MT 59703
(406) 723-3205

Attorneys for Respondent
Burlington Northern
Railroad Company
*Counsel of Record

June 15, 1990

(3)

No. 89-1827

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

SILAS E. COUNTS,
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v.

BURLINGTON NORTHERN RAILROAD COMPANY,
Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

JOHN C. HOYT *
ALEXANDER BLEWETT, III
KURT M. JACKSON
HOYT & BLEWETT
P. O. Box 2807
Great Falls, MT 59403
(406) 761-1960

Attorneys for Petitioner
Silas E. Counts

* Counsel of Record

June, 1990

PRINTING CENTER • (406) 761-1555 • GREAT FALLS, MT 59401

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

A. SCOPE OF QUESTION PRESENTED.

Respondent, Burlington Northern Railroad Company (BN), takes issue with the manner in which petitioner, Silas E. Counts (Counts), has stated the scope of the question presented for review. Contrary to BN's myopic view, this matter involves more than just the "fraudulent inducement" of the "release" of a FELA claim. Counts alleged a number of intentional torts committed by BN in the investigation, negotiation, settlement *and* release of his FELA claim, including misrepresentation, deceit, economic duress, coercion *and* fraud.

BN is *incorrect* in representing to this Court that Counts did not allege intentional torts other than fraud in Cause No. CV-86-87-H-CCL. The opinion of the Ninth Circuit Court of Appeals very clearly sets forth the

facts of BN's intentional misrepresentation, deceit and economic coercion. In order to properly address the important issue of federal preemption presented by this case, this Court has the right to be informed of the full scope of BN's misconduct in not only obtaining the release, but in also investigating, negotiating and settling Counts' claim.

B. INVALIDATION OF THE RELEASE.

BN disingenuously suggests that because a jury in May 1990 found the release to be invalid, it cannot, therefore, be concluded that BN "engaged in any improper conduct." Given the facts as recited by the Ninth Circuit's opinion (Appendix at 1a), BN cannot seriously contend that its conduct was anything but improper. Indeed, the jury was instructed on fraud, misrepresentation *and* economic coercion and the evidence clearly supported invalidation of the release on any or all of those grounds. If BN truly believes that its conduct was not improper, then let it defend its actions before a state court jury, just as any other citizen would be required to do.

C. DEDUCTION OF RELEASE AMOUNT.

Contrary to BN's insinuation, the District Court will reduce Counts' FELA damages by the amount paid by BN in exchange for the release. The District Court will be required to do so pursuant to *Hogue v. Southern Railway Co.*, 390 U.S. 516 (1968). Thus, BN will actually be rewarded for its intentional misconduct by a reduction of Counts' FELA damages. Certainly, Congress could never have intended to permit such corporate larceny when it enacted the FELA.

D. THIS COURT HAS NOT ALREADY DECIDED THE QUESTION PRESENTED.

According to Sup. Ct. R. 15.1, the purpose of BN's brief in opposition is to assist the Court "in the exercise of its discretionary jurisdiction". Rather than fulfilling this purpose, BN's brief attempts to mislead the Court into believing that it has already decided the question of federal preemption of state intentional tort law within the context of the investigation, negotiation, settlement and release of a FELA claim. Counts respectfully submits that this Court has *not* previously decided the issue presented by this case.

In *Dice v. Akron, Canton & Youngstown Railroad Co.*, 342 U.S. 359

(1952), this Court did *not* rule that state law causes of action for intentional torts are preempted by the FELA. The Court simply held that in negligence actions brought pursuant to the FELA where a release is raised as a defense, federal law rather than state law applies to determine the validity of the release:

> We...hold that validity of releases under the Federal Employers' Liability Act raises a federal question to be determined by federal rather than state law. Congress in § 1 of the Act granted petitioner a right to recover against his employer for damages *negligently* inflicted. State laws are not controlling in determining what the incidents of *this* federal right shall be.

Id. at 361 (emphasis added). Thus, the Court held that in determining the "incidents" of the *negligence* cause of action created by the FELA, federal law will apply. The Court did not discuss the preemption of state intentional tort law in cases such as this.

Since the question presented has *not* been previously decided by this Court, there is a compelling reason for granting the Writ. Unless the Court accepts jurisdiction, there will be a huge void in the law. The FELA will not provide a remedy and state law will be preempted from filling the void. Railroad employers should not be permitted and perhaps encouraged to take advantage of this void to commit intentional torts for which there is, at present, no remedy.[1]

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[1] In *State v. Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*, 484 P.2d 1146 (Wash. 1971), a state law requiring modern spark arresters on locomotives was upheld against a preemption challenge under the Federal Boiler Inspection Act, 45 U.S.C. § 23, because there was no federal law governing the same subject. The court held:

> Were we to hold otherwise, the state would be left with an *untenable void*—without the protection of federal regulations, yet, at the same time, prevented from enacting regulations of its own for the protection of the property of its citizens against an obvious and serious hazard.

Id. at 1149 (emphasis added). By the same token, without action by this Court, defrauded employees such as Counts will be left without any protection from a railroad's intentional misconduct.

E. STATE INTENTIONAL TORT LAW DOES NOT CONFLICT WITH THE FELA.

The focus of BN's argument appears to be that state intentional tort laws somehow conflict with the FELA's "uniform" set of laws and that, therefore, such state laws are preempted. BN's argument clearly misses the mark. Since the FELA does not even touch (let alone occupy) the field of intentional tort law, there is simply no way that state intentional tort laws can conflict with the negligence provisions of the Act.

The application of state intentional tort laws to conduct such as that exhibited by BN in this case will not frustrate or impede Congress' intent to provide a uniform set of laws governing an employee's cause of action for personal injuries *negligently* inflicted by his railroad employer. Counts is not requesting this Court to apply state negligence law in an attempt to change or "trench" on areas already governed by the FELA. State intentional tort law is a necessary companion to a federal Act which was never intended to occupy the field of intentional tort law.

Certainly, the Court of Appeals recognized the validity of Counts' argument that there must be a right or entitlement to some additional recovery due to BN's intentional misconduct which is not provided under the FELA. Whether such additional recovery be by virtue of state law or federal common law, the FELA was not intended to preempt all such avenues of relief. Indeed, BN ignores the legislative history of the FELA which patently demonstrates a Congressional intent to leave all preexisting common law remedies intact. 45 Cong. Rec. 4044 (1910). Appendix at 20a. BN's simplistic recitation of the "trade-offs" allegedly resulting from the FELA's enactment is out of place. Although Congress created a uniform set of laws dealing with *negligence* actions, it did *not* enact a "comprehensive" set of laws governing intentional misconduct such as that committed by BN in this case. In the Congressional "balancing" act referred to by BN, intentional tort law was left out of the equation.[2]

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[2]An analogous situation can be found in the workers' compensation field where the majority of courts have held that the enactment of comprehensive workers' compensation benefit schemes does not preempt or bar an independent action for intentionally tortious conduct committed by a workers' compensation insurer or employer during the processing and settlement of a workers' compensation claim. *See, Birkenbuel v. Montana State Comp. Ins. Fund*, 687 P.2d 700 (Mont. 1984) and authorities cited therein.

It is interesting that BN does not even attempt any preemption analysis. *See, California Federal Savings & Loan Association v. Guerra*, 479 U.S. 272 (1987). BN must realize the weakness of its position. It refuses to acknowledge that federal preemption must not be lightly presumed. Only if this Court intercedes and exercises its jurisdiction will railroad employees be protected from the ongoing misconduct of railroad employers, such as the BN in this case.

CONCLUSION

BN's objections are without merit. The Petition for Writ of Certiorari should be granted.

RESPECTFULLY SUBMITTED,

John C. Hoyt*
Alexander Blewett, III
Kurt M. Jackson
HOYT & BLEWETT
P. O. Box 2807
Great Falls, MT 59403
(406) 761-1960

Attorneys for Petitioner
Silas E. Counts

*Counsel of Record

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